NOT FOR PUBLICATION

NO. 20657

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

KEVIN OLD, Plaintiff-Appellant,
v. HUNTER ENGINEERING COMPANY,
a Missouri Corporation, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 94-3807)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Kevin Old (Old) appeals the April 1, 1997 amended judgment of the circuit court of the first circuit,[1] entered following a bench trial, that granted final judgment in favor of Hunter Engineering Company (Hunter), a Missouri corporation, on all claims Old asserted in his breach of contract complaint against Hunter, and awarded Hunter $13,240.08 in attorneys' fees and costs. We affirm in part, and vacate and remand in part.

Although the record on appeal contains the court files, the exhibits admitted into evidence at trial, and the transcript of a hearing on a post-judgment motion, Old has failed to include any transcripts of the bench trial itself in the record on appeal. According to Hawaiʻi Rules of Appellate Procedure (HRAP)

[1] The Honorable Marie N. Milks, judge presiding.

Rule 10(a)(4) (West 2002), "[t]he record on appeal shall consist of . . . . the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b)[.]" HRAP Rule 10(b)(1)(A) (West 2002) places on the appellant the affirmative burden of providing the transcript of the proceedings:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

Thus, it is well settled that "'[t]he burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). More specifically, where, as in numerous instances here, the appellant urges that a finding or conclusion of the lower court is unsupported by or contrary to the evidence, "the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." HRAP Rule 10(b)(3) (West 2002). In this regard, we have held that

> if the appellant wishes to urge that a finding or conclusion is unsupported by the evidence, he must include a transcript of all the evidence relevant to such finding or conclusion. . . . An appellant . . . has the burden to designate all the evidence, good and bad, material to the point he wishes to raise.
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> The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error. An appellant must include in the record all of the evidence on which the lower court might have based its

> findings and if this is not done, the lower court must be affirmed.

Union Bldg. Materials Corp., 5 Haw. App. at 151-52, 682 P.2d at 87 (citations omitted). Thereupon, we concluded:

> The state of the appellate record is such that all of the evidence presented to the trial court is not presented here and we have no way of knowing if the evidence omitted is relevant. Therefore, we cannot say that the court's findings are not supported by substantial evidence and are clearly erroneous.

Id. at 153, 682 P.2d at 88.

In this case, Old did file a request for the reporters' transcripts of the bench trial. However, no transcripts of the bench trial were included in the record on appeal, either by original or supplemental filing. Old did not ultimately remedy the omission and thus fulfill his responsibility to ensure that the record as constituted is adequate to carry his case on appeal. HRAP Rule 11(a) (West 2002) ("After the filing of the notice of appeal, the appellant . . . shall comply with the provisions of [HRAP] Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record."); Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559 ("it is counsel's responsibility to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected" (brackets, citation and internal quotation marks omitted) (referring to the then-applicable Hawai'i Rules of Civil Procedure (HRCP) Rule 75(d), the predecessor court rule to HRAP

Rule 10(e)(2) (West 2002)[2]). Hence, we may dismiss Old's appeal. See, e.g., Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559. As we have stated,

> the burden is on appellant to convince the appellate body that the presumptively correct action of the circuit court is incorrect. To that end, an appellant is required to file a notice of appeal, order the transcript of the proceedings below, and arrange for transmission of the record. The burden is upon appellant to comply with the rules. The only positive requirement placed on an appellee is to file an answering brief, except where appellee files a cross-appeal, or may wish to respond to an act by appellant. So great is the burden on appellant to overcome the presumption of correctness that appellee's failure to file an answering brief does not entitle appellant to the relief sought from the appellate court, even though the court may accept appellant's statement of facts as correct.

Costa v. Sunn, 5 Haw. App. 419, 430, 697 P.2d 43, 50-51 (1985) (internal citations omitted).

We are cognizant, however, of a longstanding, general policy of our appellate courts, "of affording litigants the opportunity to have their cases heard on the merits, where possible," Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001) (citation and internal quotation marks omitted), and of specific exception made where an appeal can be decided on the record as is, the absence of a transcript of the proceedings below notwithstanding. Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961) ("An exception, however, is made to the rule where evidence is not

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[2] Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(e)(2) (West 2002) provides that "[i]f anything material to any party is omitted from the record by error or accident or is misstated therein, corrections or modifications may be [(sic)] as follows: (A) by the stipulation of the parties; or (B) by the court or agency appealed from, either before or after the record is transmitted; or (C) by direction of the appellate court before which the case is pending, on proper suggestion or its own initiative." (Format modified.)

necessary for the disposition of an appeal on its merits." (Citation omitted.)). We believe that exception is applicable here. The parties to this appeal do not dispute any of the court's enumerated findings of fact, HRAP Rule 28(b)(4)(C) (West 2002),[3] and the findings of fact are therefore binding upon them. Findings of fact that are unchallenged on appeal are the operative facts of the case. Poe v. Hawai'i Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (Citation omitted.)). The court filed numerous, detailed findings of fact (FsOF or, singular, FOF) along with its conclusions of law (CsOL or, singular, COL) in support of its amended judgment. After reviewing the binding FsOF and CsOL, in conjunction with the exhibits admitted into evidence at the bench trial, we are of the opinion that error, or the absence of error, as the case may be, is manifest and unambiguous on the face of them, as a matter of law. Brown v. KFC Nat'l Management Co., 82 Hawai'i 226, 239, 921 P.2d 146, 159 (1996) ("As a general rule, the construction and legal effect to be given a contract is a question of law freely reviewable by an appellate court. The determination whether a contract is ambiguous is likewise a question law that is freely reviewable on

[3] HRAP Rule 28(b)(4)(C) (West 2002) provides that the opening brief on appeal shall contain a "concise statement of the points of error" and that each point of error "shall also include[,] . . . when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error[,]" in default of which the point "will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."

appeal." (Citations and internal quotation marks omitted.)). Under the circumstances, we conclude that the transcripts of the bench trial are "not necessary for the disposition of [this] appeal on its merits," and we will proceed to decide it. Marn, 44 Haw. at 663, 361 P.2d at 388 (citation omitted).

1. The Sales Agreement.

It is clear from the FsOF and CsOL that the court decided Old was not entitled to the sales commissions he claimed under his December 16, 1988 exclusive Sales Representative Agreement (Sales Agreement) with Hunter because Old provided "substandard" installation, training and servicing to buyers of Hunter equipment. See FsOF 45-46; CsOL 9-11. This was an error in contract interpretation and hence, an error of law. Brown, 82 Hawai'i at 239, 921 P.2d at 159.

Equipment installation and customer training and servicing were the subjects of Old's December 16, 1988 exclusive Service Representative Agreement (Service Agreement) with Hunter. The Sales Agreement, on the other hand, covered only the sale of Hunter equipment and made no provision for -- indeed, no mention of -- such other matters. Moreover, the Sales Agreement provided that sales commissions were due upon Hunter's receipt of payment for the equipment sold:

> 5. Commission will be credited to the sales representative in whose territory the order is to be shipped at the rate of commission based upon the commission schedule (see Commission Rates, Salesmen Form 1320T). A sales contract for the territory must be in effect at the time of receipt of order at Hunter. If no sales contract is in effect

> at the time of receipt of the order at Hunter, commission will accrue to Hunter Engineering Company. Said commission, while credited at time of receipt of order at Hunter, is not earned or payable to sales representative until payment for the order is received by Hunter.

In contradistinction, the Service Agreement provided that service commissions were due upon Hunter's receipt of buyer acknowledgment of satisfactory installation, training and/or servicing:

> 3. [Hunter] agrees that services will be performed by [Old] upon the Hunter products at prices which shall be determined by [Old] and his customers. [Hunter] shall furnish [Old] from time to time with suggested charges for service and training, to assist [Old] in determining charges which shall be competitive with that prevailing in the industry. In the case of installation and training of personnel on new Hunter equipment, it is understood that [Old's] installation fee shall be determined in accordance with the schedule annexed hereto as Current Hunter Form 334T. After the customer has notified [Hunter] that the installation of said equipment and the training of personnel has been completed to customer's satisfaction, [Hunter] will remit the entire installation fee to [Old] (see Hunter Form 334T). In addition, in cases where [Hunter's] sale price includes a second service call or "30 day callback", for certain equipment [Hunter] will remit the entire commission to [Old] immediately upon receipt of written notice from the customer that a satisfactory second service check has been completed (see Service Representative Commission Schedule, Hunter Form 1321T). In all other instances involving service or training on previously installed Hunter equipment, [Old] shall be solely responsible for the method of billing his customers and for the collection of said charges.

We acknowledge that, if the two agreements were merely two parts of a single contract, then generally, Old's breach of the one would prevent him from claiming the benefits of the other as well as the one, and vice versa. See Smith-Scharff Paper Co., Inc. v. Blum, 813 S.W.2d 27, 28 (Mo. Ct. App. 1991) ("A party to a contract cannot claim its benefits where he is the first to violate it." (Citations omitted.)).[4] The two agreements were,

[4] Both agreements at issue in this case included the following provision: "This Agreement shall be deemed to be a Missouri Contract, and any disagreements pertaining hereto shall be determined pursuant to the law of the State of Missouri." See Airgo, Inc. v. Horizon Cargo Transp., Inc., 66 Haw.

however, clearly separate and discrete and distinctly different, not only as to subject matter, but as between sales and service commissions and as to when and how Old was to be entitled to payment of each, and it was error to import provisions of the Service Agreement into the Sales Agreement and to create thereby, a condition precedent to payment under the latter not expressly provided for therein. Hayes v. Reorganized School Dist. No. 4, 590 S.W.2d 115, 116-17 (Mo. Ct. App. 1979) ("When parties reduce their agreement to writing, it is presumed that the instrument contained their entire contract. We should not enlarge or extend the agreement." (Citations omitted.)); Acetylene Gas Co. v. Oliver, 939 S.W.2d 404, 410 (Mo. Ct. App. 1996) ("No implied provision can be inserted to supply an obligation concerning which the contract is intentionally silent, even though without such provision the contract would be unwise or even operate unjustly." (Citation and internal quotation marks omitted.)). Had Hunter awarded the Sales Agreement to one person and the Service Agreement to another person, this point would be intuitive.

The court denied Old's claims for sales commissions under the Sales Agreement on an alternative basis -- that Old

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590, 595, 670 P.2d 1277, 1281 (1983) (per curiam) ("When the parties choose the law of a particular state to govern their contractual relationship and the chosen law has some nexus with the parties or the contract, that law will generally be applied. RESTATEMENT (SECOND), Conflict of Laws § 187(1) (1971).").

failed to submit to Hunter written acknowledgment (Form 492T) from the buyers of satisfactory installation, training and/or servicing. See FsOF 14-18, 45-46; CsOL 11-12. Again, however, there is no such condition precedent to the payment of sales commissions in the Sales Agreement. Hayes, 590 S.W.2d at 116-17; Acetylene Gas Co., 939 S.W.2d at 410. The court nonetheless concluded that the course of performance and/or course of dealing between the parties had made submission of a Form 492T just such a condition precedent. While such courses may give meaning to the terms of the contract, they may not alter the plain meaning of the contract:

> A course of performance by the parties to a contract which tends to show an interpretation by either one or both parties contrary to the plain terms of the contract does not control, but rather the contract is construed as written. Additionally, covenants will not be implied in a contract for any matter that is specifically covered by the written terms of the contract itself. . . . Therefore, any evidence of course of dealing or performance cannot be used to alter the plain meaning of the contract.

Id. at 409 (citations omitted). Moreover, "express terms [of a written contract] are given greater weight than course of performance [and] course of dealing[.]" Hayward v. Taylor, 807 S.W.2d 171, 173 (Mo. Ct. App. 1991) (citation and block quote format omitted).

We conclude, under the Sales Agreement, that sales commissions were due Old for orders shipped to his Hawai‘i territory when Hunter was paid for the orders. In this connection, the court found:

> 47. For the invoices listed and identified in Exhibit 4, Hunter

> has received payment from or issued a credit to those persons or entities to whom its products were sold and shipped.

Accordingly, Old was due some, see FsOF 30, 48, if not all, sales commissions he claimed under the Sales Agreement, and the court's amended judgment must be vacated in that respect and the case remanded for the court's determination of the amount of sales commissions Old is due under the Sales Agreement.

2. The Service Agreement.

The court did not err in denying Old's claims for service commissions because the court found that Old did not fulfill his contractual obligations under the Service Agreement.

Old did not submit Form 492Ts, written notification of customer satisfaction with his installation, training and/or services, which was a condition precedent to payment of service commissions under the express terms of the Service Agreement. See FOF 55; COL 10. As for Old's reliance upon the doctrine of substantial performance, the court found, on the basis of credibility, see Tachibana v. State, 79 Hawai'i 226, 239, 900 P.2d 1293, 1306 (1995) ("it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence" (brackets, internal quotation marks and citation omitted)); Meyer v. Meyer, 775 S.W.2d 561, 566 (Mo. Ct. App. 1989) ("credibility of witnesses and the weight to be given their testimony in this judge-tried case was for the trial court's determination"), that it was Old's

successor, and not Old, who satisfactorily rendered most of the services for which Old now claims commissions. See FsOF 19-44, 54-55. Obviously, Old cannot recover commissions for services he did not perform. Moreover, the Service Agreement required that Old exert "his best efforts to personally service and install Hunter products and to train others to utilize and service Hunter products." The court found that he did not. See FsOF 6, 28-44, 54; COL 7. Given Old's several contractual derelictions, Hunter was under no contractual obligation to pay Old the service commissions he claimed. Smith-Scharff Paper Co., Inc., 813 S.W.2d at 28 ("A party to a contract cannot claim its benefits where he is the first to violate it." (Citations omitted.)).

As for Old's assertion that Hunter prevented or rendered impossible his performance and submission of Form 492Ts under the Service Agreement, the court concluded that Hunter did neither, see COL 10, and nothing in the record or common sense indicates that this conclusion was clearly erroneous. Bailey v. Sanchez, 92 Hawai'i 312, 316 n.6, 990 P.2d 1194, 1198 n.6 (App. 1999) ("A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." (Brackets, citation and internal quotation marks omitted.)). Old also argues on appeal that the difference between the total amount of service commissions he claims and the total value of the services the court expressly found his

successor performed should, as a matter of mathematics and logic, be awarded to him. We observe, however, that the court's listing of his successor's Form 492Ts appears merely exemplary and not exhaustive. See FOF 54. And we again point to the court's finding that Old breached his contractual "best efforts" obligation. Smith-Scharff Paper Co., Inc., 813 S.W.2d at 28. In any event, Old forgets that it was his burden to prove up his claims, Hayes, 590 S.W.2d at 116 ("The burden of proving breach of a contract rests on the party claiming the breach." (Citations omitted.)), but that the court found and concluded, on the basis of credibility, Tachibana, supra; Meyer, supra, that he did not. See FsOF 28, 54-55; COL 13.

We conclude that the court did not err in denying Old's claims for service commissions under the Service Agreement.

3. Attorneys' Fees and Costs.

Given our disposition of this appeal, the court's award of attorneys' fees and costs must also be vacated and remanded, because the court based its award on Hawaii Revised Statutes § 607-14 (in assumpsit actions, the court may award reasonable attorneys' fees to the "prevailing party" to be paid by the "losing party") and HRCP Rule 54(d)(1) (West 2002) (costs allowed to the "prevailing party"), rather than applicable Missouri law. In this connection, we direct the court's attention to the

following holding of the supreme court:

> The trial court awarded Horizon Cargo and Airgo attorneys' fees and prejudgment interest pursuant to Hawaii law. Airgo claims that the trial court erred in ruling that claims for attorneys' fees and prejudgment interest are governed by Hawaii law. The parties expressly agreed in both service agreements that any disputes were to be resolved under Texas law. One of the prime objectives of contract law is to protect the justified expectations of the parties. When the parties choose the law of a particular state to govern their contractual relationship and the chosen law has some nexus with the parties or the contract, that law will generally be applied. RESTATEMENT (SECOND), Conflict of Laws § 187(1) (1971). We conclude that in accordance with the parties' expectations, the substantive law of Texas should have been applied in the present case. Accordingly, we reverse on this point.

Airgo, Inc. v. Horizon Cargo Transp., Inc., 66 Haw. 590, 595, 670 P.2d 1277, 1281 (1983) (per curiam).

Therefore,

IT IS HEREBY ORDERED that the court's April 1, 1997 amended judgment is affirmed insofar as the court denied Old's claims for service commissions under the Service Agreement. However, the amended judgment is vacated insofar as the court denied *in toto* Old's claims for sales commissions under the Sales Agreement and awarded Hunter its attorneys' fees and costs, and the case is remanded for proceedings not inconsistent with this order.

DATED: Honolulu, Hawaii, June 27, 2003.

On the briefs:

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Associate Judge